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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91191056
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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White Rock Distilleries, Inc.

Opposition No. 91191056

Opposer

Mark: PINNACLES RANCHES

v.

Serial No.: 77/598674

Franciscan Vineyards, Inc.

Applicant
-----X

**APPLICANT'S MOTION TO STRIKE, EXCLUDE, AND/OR LIMIT CERTAIN
OF OPPOSER'S PROFFERED EVIDENCE**

Applicant moves to strike or limit certain evidence submitted by Opposer and moves to exclude the testimony and associated documentary evidence of Opposer's proffered expert.

I. Applicant moves to strike, in part, and/or limit the probative value of Opposer's Notice of Reliance on Internet Materials filed by Opposer under Notice of Reliance at Docket Entry # 24.

The Opposer's Notice of Reliance (Docket Entry #24) is comprised entirely of Internet Materials (the "Internet Materials" or "Materials"). Following the decision in *Safer Inc v OMS Investments Inc.*, 94 USPQ2d 1031 (TTAB 2010), the Board amended TBMP §704.08(b) to read:

Internet Materials

The probative value of Internet documents is limited. They can be used to demonstrate what the documents show on their face; however, documents obtained through the Internet may not be used to demonstrate the truth of what has been printed. A printout from a webpage may have more limitations on its probative value than traditional printed publications. A party may increase the weight the Board will give website evidence by submitting testimony and

proof of the extent to which a particular website has been viewed. Otherwise, the document may not be considered to have much probative value.

Applicant objects to the Notice of Reliance on the bases that (1) pursuant to Fed. R. Evid. 403, the Internet Materials constitute a needless presentation of cumulative evidence, (2) the Materials are being improperly relied upon by Opposer for the truth of matters contained therein, (3) certain of the Materials are clearly unreliable and any probative value is outweighed by the clear danger of unfair prejudice, and (4) they are of limited or no relevance (Fed. R. Evid. 402).

The Internet Materials comprising Opposer's Notice of Reliance (Docket Entry #24) may be summarized as:

1. Internet materials referring to Pinnacles Airport / Pinnacles Ranch Airport (at pp. 8-15, 18, 21-34, and 75-77)
2. Internet materials referring to Pinnacles National Monument (at pp. 16, 17, 39, 53, 56-70, and 78-204)
3. Internet materials referring to Pinnacles High School (at pp. 37, 38, and 40-45)
4. Internet materials referring to Pinnacles Ranch (at pp. 19, 20, 56-57, 74, and 95-100)
5. Miscellaneous additional Internet materials (at pp. 35-36, 46, 48-50, 51-52, 54-55, and 71), including a USGS webpage for "Pinnacles" that refers to the same as being unincorporated and having no legal boundaries (at 35-36).

As the above documents may be referred to solely for what they show on their face, they clearly constitute a needless presentation of cumulative evidence of the existence of Internet references to certain places.

Further, in Opposer's Main Brief, *at* p. 7 (paragraphs 2 and 3), Opposer is attempting to rely upon certain of the Materials for the alleged truth of matters set forth therein (i.e., certain facts concerning Pinnacles National Monument, an alleged ranch area, and airport). Applicant hereby moves that all of the alleged facts set forth in paragraphs 2 and 3 of page 7 of Opposer's Main Brief be stricken on the grounds of hearsay, and as being violative of Board rule TBMP §704.08(b), and the long-held rule as amply set forth in relevant case law.

Internet Materials are admissible solely for what they show on their face, not for the truth of matters contained therein. *See, Volkswagenwerk Aktiengesellschaft v. Ridewell Corp.*, 201 USPQ 410 (TTAB 1979) (advertisement submitted with notice of reliance only showed that advertisement appeared on that date in that journal and does not show customer familiarity with marks nor actual sales); *See also, Exxon Corp. v. Fill-R-Up Systems, Inc.*, 182 USPQ 443, 445 (TTAB 1974) (articles from trade publications admissible to show that they appeared in the publication on a certain date and that they contained certain information, but not that the information is true). Accordingly, the facts set forth in Opposer's Trial Brief at p. 7 (paragraphs 2 and 3) should be stricken in their entirety.

Further, certain of the Internet Materials attached to the Notice of Reliance are clearly unreliable and as such present a clear danger of unfair prejudice. The Board should give no consideration to Opposer's attempts to create inferences from the Materials.

For example, as set forth in the Summary of Internet Materials above, are a set of materials referring to an "Pinnacles airport." Opposer front loads the Materials with web pages that would give the perception that the airport handles private corporate jet charters. It is, however, reasonable to assume that the domain holder used some master list of all airports and landing strips in order to generate and populate its webpage in response to user queries for whatever airport or airstrip name is used in the query. Solely to show the unreliability of such a document Applicant filed with a Notice of Reliance (at Docket Entry #53), a document detailing facts about the airport in issue, namely that it is a private, unlighted airstrip, approximately 3000 X 50 ft long, with a grass/sod surface. To the extent that Opposer filed its airport references to give the impression that the airport is generally known, rather than being the actual obscure and remote airport that it is, such documents should be stricken and given no consideration.

The same goes for Opposer's Internet Materials that refer to Pinnacles High School. To the extent that Opposer filed the High School references to give the impression that the High School is generally known, rather than being a small (student body of 81 kids), local, and obscure High School, such documents should be stricken and given no consideration.

The same goes for the USGS references to a place called "Pinnacles" (White Rock NOR Pr. Pub., Docket Entry #24, at pp. 35-36). To the extent the document is proffered as or to be considered as an "official record" under the Rules, Applicant notes that the document states that Pinnacles is "unincorporated and has no legal boundaries" and, that it is "not a census designated or incorporated place having an official federally recognized name." The documents are irrelevant except to show how local, remote and obscure the reference is.

Applicant moves that the probative value of Opposer's Notice of Reliance (Docket Entry #24) on Internet Materials be limited and restricted to what they show on their face, namely as evidence that purports to indicate the existence of a national monument in California called "Pinnacles National Monument," and a small airport or airstrip in California called "Pinnacles Ranch Airport," and a ranch previously owned by a third party that may or may not have been called Pinnacles Ranch and which is now part of the Pinnacles National Monument, and a small High School in California named Pinnacles High School. The documents do not evidence anything other than, perhaps, local familiarity, they are not evidence that the places are generally known and are not evidence of the truth of any fact or statement made in the Materials.

Applicant also objects to the Internet Materials as having little or no relevance. The documents have nothing to do with wines, vineyards or wineries. Their relevance lies in the fact that the Materials and the publications referencing same tend to prove how obscure and remote these places are.

In fact, Opposer's own proffered expert stated that Pinnacles National Monument is "a designated wilderness area in the Gabilan Mountains in California. . . . See Reidl Dep. at 58:2-6

Further, Applicant does not use the term "Monument" or "National" or "airport" or "High School" on its wines and nothing on Applicant's products (e.g., labels, capsules, corks, etc.) makes any reference to Pinnacles National Monument, or Pinnacles Ranches Airport, or Pinnacles High School.

II. Applicant moves to strike Opposer's proffered expert's Rule 26 Disclosure Statement / Declaration and exhibits thereto filed at Docket Entry # 15.

Mr. Reidl's Rule 26 Disclosure Statement/Declaration (and its accompanying documents/exhibits) is a discovery disclosure document. It was filed by Opposer during the relevant discovery period. It was not filed by Opposer during its testimony periods. Further, the Disclosure Rule 26 Statement/Declaration is replete with hearsay.

Even if the Disclosure Statement/Declaration falls within the definition of "a written disclosure" under 37 CFR §2.120(j), the regulation is clear that:

(j)(3)(i) A . . . written disclosure (but not a disclosed document), which may be offered in evidence under the provisions of paragraph (j) of this section, may be made of record in the case by filing the . . . copy of the written disclosure, together with a notice of reliance. The notice of reliance and the material submitted thereunder should be filed during the testimony period of the party that files the notice of reliance. . . .

and

(j)(3)(ii) A party that has obtained documents from another party through disclosure or under Rule 34 of the Federal Rules of Civil Procedure may not make the documents of record by notice of reliance alone, except to the extent that they are admissible by notice of reliance under the provisions of § 2.122(e). (*See also*, 37 CFR §2,120(j)(8)).

and

(j)(5) Written disclosures . . . may be submitted and made part of the record only by the receiving or inquiring party.

Opposer did not file the document or exhibits during its testimony period and obviously did not do so by Notice of Reliance and Applicant, not Opposer was the receiving party.

Opposer refers to and relies upon the document at the following sections of its Trial Brief: p. 7 (second paragraph); p. 12 (references in the first partial paragraph); pp. 19-20 the quote from ¶35 of the improper document. All such references should be stricken.

III . Applicant moves to strike/exclude Exhibits 4 and 5 to the testimony deposition of Opposer's proffered expert, Paul Riedl (at Docket Entry # 26)

At Riedl Dep. 7:11-25 and 8:11-20 respectively, Opposer's attorney had Mr. Riedl merely identify Mr. Riedl's Disclosure Statements/Declarations (i.e., Exhibits 4 and 5 to the Riedl Dep.). The only direct reference to the exhibits by Opposer's attorney were at Riedl Dep. at 78:17 through 25:6 and at 81, where he merely refers to conclusory headings and asks why Mr. Riedl reached such conclusions.

To the extent Opposer is relying upon anything stated in the exhibits, Applicant moves that the same be stricken. They were used by Opposer solely for identification purposes.

IV. Applicant moves to strike and/or exclude the testimony and accompanying exhibits of Opposer's proffered expert, Paul Riedl. (Docket Entry #s 25-34)

In this proceeding, Applicant primarily relies on the testimony and report of its proffered expert, Paul W. Riedl (formerly, the Associate General Counsel for E. & J. Gallo). Opposer disputes that Mr. Riedl qualifies as an expert, disputes his expertise in certain areas, disputes that the questions and types of questions asked of Mr. Riedl and his testimony responses thereto requires or lends itself to expert testimony or to understanding the evidence or to determining

any fact in issue¹, disputes his methodologies, his recitation of applicable laws, disputes his findings, and disputes many of the statements made by and conclusions reached by Mr. Reidl.

Nearly all of the questions asked of Mr. Reidl were not the types of questions that would require expert testimony in this or any other case. Mr. Reidl's responses amounted to nothing more than his personal, biased, opinions.

Mr. Reidl's educational background does not qualify him as an expert in any matter that he gave testimony on. He has a BA in political science with a concentration on speech communication and theology and a law degree. Reidl Dep. at 9.

Mr. Reidl's employment background does not qualify him as an expert in this case. He was employed out of law school as a clerk then an associate at Crowell & Moring. His practice focused on business counseling and litigation in the business law area, primarily antitrust, contracts, and natural resources law. Reidl Dep. at 11.

He was then employed by E. & J. Gallo Winery for approximately 18 years achieving the title Associate General Counsel there (Reidl Dep. at 11-19). His duties and responsibilities included litigation and business and legal advice with respect to labeling and packaging decisions, handling and responding to regulatory issues, trademarks, regulatory compliance issues, product label review, and development of brand names [at 11-17]. While his experience gave him a body of knowledge concerning the wine industry from a legal perspective, it does not qualify him as an expert concerning the specific matters he testified to.

Mr. Reidl's tenure as President of INTA in 2006 does not qualify him as an expert in this case. While he was involved with the TRIPPS Section 2(a) issue while President (*See* Reidl Dep. at 10), it does not qualify him as some expert on Section 2(e)(2) issues.

¹ Consistently throughout Mr. Reidl's testimony, Opposer's attorney objected to the questions / responses on the basis that the same does not require or lend itself to expert testimony.

Mr. Reidl has not published any works that deal specifically with the issue of geographical descriptiveness under 15 USC §1052(e). There is no record of Mr. Reidl ever appearing in any case or proceeding as an expert. There is no record of Mr. Reidl ever giving a deposition as an expert in any case of proceeding. There is no record of Mr. Reidl having ever been qualified as an expert.

The admissibility of expert testimony is governed by Federal Rule of Evidence 702, *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) and its progeny, *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).² In relevant part, Rule 702 provides:

“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise [...].”

See Fed. R. Evid. 702.

The proposed expert testimony must be based on a reliable foundation and free from bias. See, *The Pension Committee of the Univ. of Montreal Pension Plan v. Banc of America Securities, LLC*, 691 F.Supp.2d 448, 457-458 (S.D.N.Y. 2010).

i. Mr. Reidl’s “Marketing” Testimony is Biased and Unreliable

Mr. Reidl is a well-known trademark attorney that has worked for a wine company. He is not a marketing expert or linguist and does not conduct consumer surveys. Yet, he has been proffered by Opposer as an expert “on issues relating to whether Applicant’s PINNACLES

² The Supreme Court’s holding in *Daubert* focused on “scientific testimony; *Kumho* made clear that *Daubert*’s principles apply to ‘technical and other specialized knowledge’ as well.” *Jinro America Inc. v. Secure Investments, Inc.*, 2001 U.S. App. LEXIS 25987 at *29 (9th Cir. 2001)(quoting *Kumho*, 526 U.S. at 141, 147-49).

RANCHES mark is primarily geographically descriptive³. Mr. Reidl is a lawyer and for eighteen (18) years, he worked at Gallo. *See id.* at ¶38.

- Mr. Reidl stated that he did not have any special expertise in linguistics or in the meaning of words. *See Reidl Dep.* at 101:12-17
- Mr. Reidl did not conduct and was not asked to conduct “any consumer surveys to determine what the consumer impressions would be of the terms pinnacles or pinnacle . . . or the term ranches.” *See Reidl Dep.* at 130:21-25 through 131:3
- In response to the question “Do you believe that a consumer on the East Coast, when they see Pinnacles Vineyards, thinks of Pinnacle Monument, Mr. Reidl stated: “I don’t know.” *See Reidl Dep.* at 126:22-25 through 127:2.
- Mr. Reidl did not conduct any search of other pinnacle formations in the United States or elsewhere, and when presented with a list and website pages concerning such formation locations and when asked, based upon the number of different pinnacles or locations of pinnacles throughout the world, is it your opinion that the consumer saying the word Pinnacles Ranches would only think of Pinnacles Monument?” He responded: “Counsel, I never heard of any of these. I don’t know what consumers would think of any of these.” *See, Reidl Dep.* at 164:4-14,
- Mr. Reidl would not opine on any third party registrations having obvious geographic significance, including ones he filed or was responsible for while working for E. & J. Gallo. *See Reidl Dep.* at 113:24 - 130:11 and 157:2 – 163:11; *and Reidl Dep. Exs.* 24, 27, and 28.
- When asked, over objection how he can testify as to “what Estancia intended” [by the presentation of its labels], Mr. Reidl stated: “Well, I don’t know what the Estancia marketing team intended. But . . .” *See Reidl Dep.* at 44:10-13 and 45:3-4.

³ He is also proffered by Opposer on the issue of whether “Pinnacles Ranches” functions as a trademark. As Opposer’s “fails to function claim” relies upon whether the mark is primarily geographically descriptive, the claims are, for all intents and purposes equivalent.

Mr. Reidl states that he “worked closely with...the Marketing Department, and the various Business Units on brand development and strategy.” *See* Reidl Dep. at 12:25 – 13:2. He was not and is not, however, a substitute for Gallo’s Marketing Department and should not be viewed as one by the Board in this proceeding.

Now, while it is true that courts “liberally construe[] expert qualification requirements,” Mr. Reidl’s testimony here is unreliable on numerous grounds and the Board should exercise its *gatekeeping* function and exclude the same. As a preliminary matter, the Board and the Court’s **“gatekeeping function is critically important ‘to ensure the reliability and relevancy of expert testimony.’”** *Jinro America*, 2001 U.S. App. LEXIS 25987 at *30 (quoting *Kumho*, 526 U.S. at 152)(emphasis added). That being said, “expert opinion must have an analytically sound basis so that it is not speculation in disguise.” *Thakore v. Universal Machine Co. of Pottstown*, 670 F.Supp.2d 705, 730 (N.D.Ill. 2009)(citations omitted).

To the extent that the Board considers Mr. Reidl’s testimony deposition, in whole or in part, as expert testimony, Applicant sets forth below evidence, in general, of Mr. Reidl’s flawed methodologies, and certain of his inaccurate findings, statements and conclusions, and inaccurate understanding of TTB regulations, etc. While Opposer may argue that the facts set forth below, are not all specifically relevant to the issues in this proceeding, they are nevertheless relevant to whether Mr. Reidl qualifies as an expert and are relevant to the consideration, if any, to be given his various statements in this proceeding.

The below chart illustrates Mr. Reidl’s bias and the flawed, inaccurate and/or incomplete nature of Mr. Reidl’s “marketing” expertise and industry practice as it pertains to branding on wine bottle capsules:

Mr. Reidl

Opposer’s Evidence

<p>“The placing of branding on capsules is uncommon.” [at 132]. “when you look at the wall of wine . . .most capsules don’t have printing on them” [at 137]</p>	<p>Ex. 26 to Reidl (on cross) - photographs of 73 bottles of wine as well as separate photographs of the capsule/foil area of each bottle, all showing use of branding on the capsule, and all photographed at a single liquor store in Raritan, N.J.</p> <p>Test. Guggino, Docket Entry #55, at 20-21 (who testified to actually having visited liquor stores – in contrast to Mr. Reidl’s bare statement): Guggino stated that branding on capsules is very common: “I would say an estimation of 60-75 percent of the wines and spirits that I’ve seen in stores use some type of branding on the capsules.”</p> <p>Test. Rannells, ¶7: “Based upon my own review of wines on display at the store I estimate that well in excess of 1/3 of all the wines on display at the store bare some marking on the capsule/foil sleeve.”</p> <p>Test. Rannells, Ex. “1” (photographs of 73 bottles of wine and 5 bottles of vodka as well as separate photographs of the capsule/foil area of each bottle all photographed at a liquor store in Raritan, N.J.).</p> <p>See also, Test. Lilienthal pp. 24-25.</p>
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The placing of marks and logos on wine bottle capsules is common throughout the industry. Mr. Reidl’s opinions/conclusions concerning lack of and lack of significance of such markings on capsules was without foundation and is belied by actual industry use and custom.

As a further example of Mr. Reidl’s bias and flawed, inaccurate or incomplete understanding of industry marketing practice concerning the use of branding on wine capsules:

Mr. Reidl

Opposer’s Evidence

<p>When a capsule bears a mark or logo “it mirrors the brand image that is on the main face label.” [at 137]</p>	<p>Test. Guggino at 31-32, 37: Q. You also mentioned that in your view the presence of branding on capsules is common, do you recall that? A. Yes. Q. Would you say that it’s common for branding on capsules to be different</p>
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<p>“I know of no situation where any winery has put a brand name on the capsule, in mouse-type or otherwise, that is different from the primary brand(s) on the label” [Ex. 4 (Rule 26 Report)]</p>	<p>than the primary branding on the wine label on the same bottle? A. Yes. Q. You would? A. Yes. Q. In your opinion why would it be advantageous from a marketing perspective to have a different branding [on the] capsule than on the label? A. In addition to the main brand mark there are other sub-brand marks and other design treatments that are all part of the brand’s equity umbrella.</p> <p>Test. Rannells, Ex. 1 (product / capsule photos): Numerous examples of capsule sleeves bearing marks/branding that do not appear on the main label: e.g., the photos of Tutunjian, Pacifico Sur, Trapiche, Los Vascos, Lopez Noceti, Viña Zaco, Fritz Windeisch, Sutter Home, Le Troncy, Montagny 1er Cru, Ass Kisser, Les Salices, Tommasi, Ruffino, Berringer, Stone Cellars, 7 Deadly Zins, and Toasted Head; and many show wording or other logo on the capsule sleeve that is not the main brand, examples: Los Vascos, Viña Zaco, Sutter Home, Flavium; Goats Do Roam, Cupcake, Cheval Noir, Ass Kisser, Les Salices, Tommasi, La Forge Estate, Isabella, Clos du Bois, Castello Monaci, Beringer, Stone Cellars, Earthquake, 7 Deadly Zins, Toasted Head, Menage a Trois, Gallo Family, Night Harvest, and Aveleda Fonte.</p>
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Mr. Guggino is the Vice President of Marketing for Constellation Wines U.S. the Constellation Brands division responsible for the brands under Applicant. His testimony is the testimony of an actual marketing person, and is based upon both his marketing experience and his knowledge of the actual marketplace. As is clear from the evidence, Mr. Reidl’s statements regarding non-use of non-primary brand names on capsules is biased, inaccurate and lacks foundation.

Many of Mr. Reidl’s statements concerning branding on capsules lack foundation, appear on their face to be highly biased and highlight Mr. Reidl’s lack of marketing knowledge. E.g.:

Mr. Reidl

Opposer’s Evidence

Referring to Opposer’s use of the term	Test. Guggino, at 20-21: Q. And by branding
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"Pinnacles" in repeat around the capsule sleeve Mr. Reidl states that the branding on the capsule would have very little effect on reinforcing the branding on the bottle. [at 141-142] ; also at 69: "it doesn't reinforce any branding on the front label or the back label".

Mr. Reidl testifying that the repeat surround of PINNACLES on the capsule sleeve does not create an independent impression and arguing that one of the reasons is that the mark on the capsule is not centered on the bottle's face label. [at. 70-72]

Referring to the appearance in repeat of "PINNACLES" on the capsule sleeve: "the type is so small, and the font is so small that from the standpoint of a retail shelf, the consumer can't see it." [at 69-70] And, "The term "Pinnacles" on the capsule created no shelf or consumer impression whatsoever." [Ex 4 – Rule 26 report]

what are you referring to? A. A logo mark, sub-brand mark, a design element that's being used on the front or back label or carton. Again, just utilizing that – maximizing that real estate so to speak. Q. and in your opinion Exhibits 2 and 3 before you, is the use of the term Pinnacles on the capsule foil a use consistent with what you've talked about as utilizing the space available, the real estate on a bottle of wine? A. Yes, it is. It's obviously an important attribute of the brand itself and it's being utilized in other places to accentuate it.

It's essentially repeated so that in any way that the bottle is put in front of someone, it's repeated so that you can see all or of a portion of the brand mark, a sub-brand mark, a design element, et cetera, we don't have control within production to have that line up with a specific label . . . so we repeat it to ensure that people see it from any angle. Q. In your opinion is it fairly common in the industry to do repeat surround capsules for that same purpose? A. Highly common. Test. Guggino at 22.

Test. Guggino, at 19: Q. I'm showing you again, Exhibit Number 3, the Chardonnay, can you read what it says on the capsule sleeve? A. Yes, I can. It says Pinnacles. Q. Do you have any trouble seeing it? A. No. Q. How far away are you from it? A. About three feet away. Q. I show you what's been marked as Exhibit 2. Can you read what's on the capsule sleeve? A. Yes, I can. It says Pinnacles. Q. Do you have any trouble seeing it? A. No. Q. How far away are you? A. About three feet.

Test. Guggino, at 22: Q. And I note on both Exhibits 2 and 3 that the word Pinnacles on the capsule sleeve is repeated, do you see that? A. Yes. Q. Do you have an opinion as to in your experience as a marketing vice president as to why it would be repeated on the capsule? A. It's essentially repeated so that in any way that

	<p>the bottle is put in front of someone, it's repeated so that you can see all or of a portion of the brand mark, a sub-brand mark, a design element, et cetera, we don't have control within production to have that line up with a specific label . . . so we repeat it to ensure that people see it from any angle. Q. In your opinion is it fairly common in the industry to do repeat surround capsules for that same purpose? A. Highly common.</p> <p>Also note in the photos attached to the Testimony of Rannells, that most of the markings on the capsules do not line up with the bottle label.</p>
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Again, Mr. Guggino is the Vice President of Marketing for Constellation Wines U.S. the Constellation Brands division responsible for the brands under Opposer. His testimony is the testimony of a marketing person, and based upon both his marketing experience and his knowledge of the actual marketplace. As is clear from the evidence, Mr. Reidl's statements regarding significance of non-primary brand names on capsules is biased, inaccurate and lacks foundation.

Another example of Mr. Reidl's disconnect from market knowledge is:

Mr. Reidl

Opposer's Evidence

<p>Mr. Reidl testified that the term "Ranches" is commonly added to the place name or the personal name to further ground the wine in a specific geographic location [Reidl Dep. Ex. 4 par. 12</p>	<p>Test. Guggino, at 24-27: Q. You said that you keep yourself apprised of various wine brands in the market. In your experience is the term ranches commonly used as part of a brand name or a sub-brand name on wines? A. No, it's not. / Ex. 4 (search conducted by Guggino in the USPTO -- four marks (two of which belong to Applicant) and Ex. 5 (search conducted by Guggino through the TTB for COLA's) again 4 instances of the use of</p>
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	“ranches” on labels (i.e., the same 4 as found in the USPTO database search).
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As evidenced above, Applicant’s use of the term “Ranches” (i.e., in the plural) is fairly unique in the industry. Mr. Reidl’s testimony is biased and inaccurate.

To the extent Exhibits 4 and 5 to the Reidl testimony deposition are not stricken (as so moved by Applicant, the conclusions reached by Mr. Reidl concerning lack of use of the mark PINNACLES by Applicant are flawed as a result of his not knowing or understanding TTB COLA database search results he allegedly obtained , and/or the governing regulations. For example:

Mr. Reidl

Opposer’s Evidence

Mr. Reidl states that the Certificates of Label Approval reflect that “Pinnacles” has not been used on a label for a considerable period of time. It has not been used as a principal brand name for a considerable period of time. [at 80-81]	Despite stating that he reviewed Applicant’s file wrapper for its cited registration, Mr. Reidl, somehow did not notice from the same that the cited mark was initially (and for 20 years) PINNACLE (in the singular) and he apparently did not notice the Section 7 amendment in the file wrapper amending the mark to PINNACLES in the plural. In searching COLA’s he could not remember if he searched for the “Paul Masson” brand (predecessor in interest to the mark). Test. Reidl at 92
He admits that actual Label Approvals are not available on the TTB database for pre-1999 approvals [at 95]. And, he admits that he could have ordered a copy of pre-1999 label approvals from the TTB but did not do so (“I didn’t feel it was really necessary for the report”). [at 97]	Since, as shown by Applicant’s evidence, the TTB abstracts on the TTB COLA database are not always accurate and/or applicants, not having a duty to insert a “fanciful name” on the application, the only way Mr. Reidl could determine if the actual pre-1999 labels in issue used the term “Pinnacles” or “Pinnacle” would have been to order copies of the same from the TTB. He chose not to, but nevertheless gave an opinion on incomplete information.
He states that for every post 1999 label he reviewed there was an actual label approval available to view. [at 96]	See, Test. Comunale, Docket Entry 44-45, Ex. 2 thereto: Various TTB COLA label approvals from 1999, 2001, 2002, 2003, and 2005 showing no actual label approval displayed or available for view, proving Mr. Reidl’s

	flawed facts, flawed understanding of available COLA's and attendant flawed methodology.
<p>"In the Alcoholic Beverage Labeling Act of 1988, Congress required all domestic alcohol beverage labels to contain a mandatory health warning by November 18, 1989. This required producers to obtain new COLAs for their products that contained labels with the mandatory health warning. It is therefore a certainty that a label containing PINNACLES was not legally used between November 18, 1989 and around January 1991." [Reidl Dep., Ex. 4 ¶17, fn 5] ---</p>	<p>See, Test. Price, at 13-16 and Ex. 3 thereto (TTB Circular 90-1- 1990): Ms. Price, Vice President of Regulatory Affairs for Constellation Wines U.S. testified to her awareness of the requirement for placing a particular government warning on wine labels. Ex. 3 to her testimony (TTB circular) is comprised of questions and answers regarding said government warning statement and requirements under the 1998 Act. Question 15 of the circular asks if a new label application must be submitted to add only the government warning statement. The TTB answer: "no." Resubmission was recommended but not required.</p> <p>Mr. Reidl's misunderstanding of the requirements of the Alcoholic Beverage Labeling Act of 1988 resulted in his flawed opinion concerning Applicant's and its predecessors' use of PINNACLES on labels.</p>
<p>Mr. Reidl stated that if there is a secondary name on a label, there would there be a requirement set by regulation of putting that secondary mark or designation in the Fanciful Name box. [at 95]</p>	<p>See, Test. Price, at 11: Q. And are you familiar with the form for applying for label approval? A. yes. Q. Is there a line on there for fanciful names? A. Yes, there's a box for it. Q. And is there a requirement that a fanciful name be inserted in that box? . . . A. For wine, there's no requirement that it's there.</p> <p>Also, Test. Price. at 12-13, Ex. 2 (Title 27 Part 4 Fed. Regs) -- a reference [to fanciful name] in Section 4.34 -- "in addition to the mandatory designation for the wine there <u>may be</u> stated a distinctive or fanciful name or a designation in accordance with trade understanding." It is her understanding that placing of a fanciful name on a label approval is optional ("it says it may be stated"). Further, like other third parties, even at Applicant, there is no consistency in dealing with the "fanciful name" box on label approvals. [Test. Price, at 16]</p>

Mr. Reidl also bases his statements and opinions concerning alleged lack of use of PINNACLES on labels during certain periods of time on the fact that the TTB generated COLA abstracts don't list PINNACLES as a fanciful name on the abstract. This is flawed methodology. The TTB abstracts are generated by TTB employees, not by applicants. They are flawed in that they do not always list all information from the actual label approvals. Further, the use by applicants, including Applicant, is not consistent. Often a fanciful name actually shown on a label will simply not be entered on the application (there is no requirement to do so). *See*, Franciscan NOR, Docket Entry #49 – Various Estancia COLA label approvals from TTB database (showing no insertion of fanciful name but “Pinnacles” appears on the label and also instances where a fanciful name is inserted on the application but the TTB personnel failed to insert name on the COLA abstract.

Another example of Mr. Reidl's bias in this case involves Mr. Reidl's statements regarding use of grape varietal names as “fanciful names” on COLA applications. At p. 94 of his testimony he was asked on cross if a varietal, (for example, chardonnay, pinot noir), could or would be considered fanciful names? He responded: “A pure varietal, no,” and went on to say that to his knowledge, he is not aware of people in the industry ever putting in varietal names under the Fanciful Name in their COLA applications.

Mr. Reidl testified that he oversaw label approval while at Gallo, and that it was customary at Gallo to insert in a COLA application a fanciful name if it appeared on a Gallo label (*See* Reidl Dep. at 94-95). Lo and behold, there are numerous Gallo brand label approval applications that list varietals (e.g., zinfandel, chardonnay, white burgundy, pinot noir, etc.) as fanciful names on the COLA applications. *See*, Franciscan NOR, Docket Entry #41 – E & J Gallo Colas and TESS records showing entry of varietal names as “fanciful names.”

In drawing conclusions and giving his opinion on the meaning of the term “pinnacles,” Mr. Reidl attempts to draw a definitional distinction between “Pinnacle” in the singular and “Pinnacles” in the plural. In that regard he bases his decision, in large part, on the inaccurate belief (and failure to properly review Applicant’s file wrapper⁴) that the original owner, Paul Masson named his Salinas Valley vineyard “Pinnacles” (i.e., in the plural). (See Reidl Dep. at 103-105). *See* Franciscan NOR, Docket Entry #50 (certified copy of file wrapper for Reg. No. 997,378 showing original mark was PINNACLE (singular)).

Based on his misunderstanding regarding the form of the mark under Paul Masson, he opines that the mark (“Pinnacles”) was developed as a geographic brand name corresponding to a National Monument in California. (*See*, Reidl Dep. at 105).

Mr. Reidl bases many of his opinions on this flawed belief in a significant difference in meaning between “Pinnacles” in the plural (“ice pinnacles or seracs, formations that have points or ridges”) and “Pinnacle” in the singular (“the top, the best”) (*See* Reidl Dep. at 101-103). He stated that he is not aware of any other meanings. On cross examination he admits that he has no special expertise in linguistics and no special expertise in the meaning of words. While he states that he did an on-line search of both “pinnacle” and “pinnacles” it is notable that no dictionary makes such a distinction. It is also notable that Applicant’s description of the meaning and commercial impression of its mark conforms to all the relevant dictionary definitions of the term.

Mr. Reidl uses his misunderstanding of the meanings of the parties’ respective marks (as well as his flawed understanding about the earlier use of Applicant’s mark as “Pinnacles”) to opine that Applicant’s marks have a geographic connection to Pinnacles National Monument. (Reidl Dep. at 81-84]. However, on cross examination, when asked “Do you believe that a consumer on the East Coast, when they see Pinnacles Vineyards, thinks of Pinnacle Monument?”

⁴ *See*, Franciscan NOR, Docket Entry #50 – certified copy of file wrapper for Reg. No. 997,378..

He responded: “I don’t know” (*See* Reidl Dep. at 126:22 – 127:2]. Further, *at* 130-131 he admits that he did not and was not asked to do any consumer surveys or determine what the consumer impressions would be of the terms pinnacles or pinnacle, in the singular or the term ranches.

Mr. Reidl’s flawed methodology and bias are evident. When presented with numerous examples of pinnacles formations found throughout the world⁵, including another formation in California known as “The Trona Pinnacles” (Reidl Dep. Ex. 29) he would not alter his opinion. He had not researched pinnacles formations in preparation of his report or testimony and even stated, on cross examination, “I never heard of any of these. I don’t know what consumers would think of any of these.” [Reidl Dep. *at* 164:12-14].

This, notwithstanding the *Altamont* trademark application prosecution handled during his tenure at Gallo. The Gallo application was initially refused registration on a 2(a) TRIPPS claim, and a 2(e) geographic descriptiveness basis. In the Office Action response approved by Mr. Reidl, Gallo argued, *inter alia*, that “the primary significance of the mark was not geographic because there was more than one Altamont in the United States and because the term Altamont has other significance (i.e., meaning high mountain in Spanish). Gallo’s argument was successful (*See* Reidl Dep. at 160-163 and Ex. 28 thereto). *See, also*, Reidl Dep. at 109-113 regarding Corbet Canyon.

His bias is further evident in the following: On cross examination he was shown a copy of a declaration he signed in prosecution of Gallo’s “Redwood Creek” application (*See* Reidl Dep. Ex. 30). Mr. Reidl stated that “the Declaration speaks for itself” (*See Id* at 165:11-12). The Declaration of Mr. Reidl was submitted in response to a Section 2(e)(2) claim of geographic descriptiveness, and states therein, *inter alia*:

⁵ Test. Comunale at ¶7(c) and, Ex. 3 thereto (Internet download of numerous pinnacle(s) formations).

3. I have reviewed the examiner's office action. My understanding is that she believes there is a goods-place association because there are Redwood Creeks in California (some in wine grape growing areas) and, therefore, the term has geographic significance for wine. I disagree with this theory because it is contrary to the historical and legal realities of the wine business.

4. In the wine business, terms of geographic significance are defined by national governments. These are called Geographic Indications (or, in the United States, American Viticultural Areas). These are areas where the government authorities have determined that the climate and soils of the area impact special attributes to the grapes that are grown there. . . .

5. Historically, wineries have commonly adopted trademarks that have a geographic component to them. These trademarks are routinely registered by the USPTO unless they consist of a Geographic Indication or American Viticultural Area. The mere fact that the geographic component may also be a place or feature in a wine-growing area has not disqualified them from registration. [the paragraph then sets forth a chart of trademark registrations having geographic significance as examples (Woodbridge, Acacia, Dry Creek, Atlas Peak, Nathanson Creek, Mt. Veeder, Carneros Creek, Conn Creek, Cedar Creek, Mill Creek, Barrelli Creek, Korbel, Winsor Vineyards, Red Mountain, Napa Creek, Matanzas Creek, Geyser Peak, Stag's Leap, and Jacob's Creek)].

6. The term Redwood Creek has not been designated as a Geographic Indication or American Viticultural Area. It also has no significance in the wine business.

Mr. Reidl's above position is completely absent from his testimony in the present case.

His bias is further evident by the following:

While Mr. Reidl was quick to claim that Pinnacles and Pinnacles Ranches are weak, if not geographically descriptive, when confronted with third party marks and registrations having geographic significance he would not give an opinion. And when confronted with his prior employer's marks that on their face have geographic significance, he refused to give an opinion based upon a claim of attorney-client privilege⁶.

On cross examination, Mr. Reidl was shown the documents comprising Ex. 24, namely documents identifying third party wine brands -- (1) U.S. Trademark Registration for the Brand,

⁶ See, Reidl Dep. Exs. 27 and 30 (registrations owned by Gallo having geographic significance).

(2) Webpage from the winery associated with the registrant, and (3) Downloaded Internet documents showing a corresponding geographic location of the same name. When asked, in each case if in his opinion the mark was geographically descriptive, in nearly every case, Mr. Reidl stated that he did not have enough information to form an opinion⁷.

He had scant else to form an opinion concerning Applicant's use of "Pinnacles" and "Pinnacles Ranches".

ii. Mr. Reidl's Legal Conclusions are Inadmissible as a Matter of Law

An expert's opinion on the ultimate legal issue(s) is entitled to no weight and is not evidence in the case. *See, Fisons Ltd. v. UAD Laboratories, Inc.*, 219 USPQ 661, 663 (TTAB 1983) (we will not substitute the opinion of a witness, even an expert witness, for our evaluation of the facts). *See also, In re Lindell*, 385 F.2d 453, 456, 155 USPQ 521, 524 (CCPA 1967); *See also, Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1402 (TTAB 2010) (the deciding tribunal must make its own subjective evaluation of what the average consumer will perceive the mark to be as he encounters them in the actual or hypothetical ... marketing arena); *See also, The Quaker Oats Company v. St Joe Processing Company, Inc.*, 232 F.2d 653, 109 USPQ 390, 391 (CCPA 1956).

Courts have "explicitly held that experts may not invade the court's province by testifying on issues of law." *In re Initial Pub. Offering Sees. Litig.*, 174 F.Supp.2d 61, 64 (S.D.N.Y. 2001)(collecting cases). The same would be true for any proceeding before the Board. Specifically, Mr. Reidl "cannot give an opinion as to [his or] her legal conclusion; *i.e.*, an

⁷ Namely: Atlas Peak / Atlas Peak Summit in California [at pp. 113-114]; Baltimore Bend Vineyard / Baltimore Bend [115-116]; Cathedral Mountain Vineyard / Cathedral Mountain [116-118]; Chalone / Chalone AVA [120-121]; Dry Creek Vineyard / Dry Creek in California [122-123]; Duncan Peak Vineyards / Duncan Peak [123]; Indian Peak Vineyards LLC / Indian Peak [123-124]; Jericho Canyon Vineyards / Jericho Canyon [124]; Keswick Vineyards / Keswick [124-125]; Soda Creek Vineyards / Soda Creek (of which the witness was aware) [127]; Tahoe Ridge Vineyards & Winery / Tahoe [128-129]; Victoria Creek Vineyards / Victoria Creek [129]; Yosemite Road [129-130].

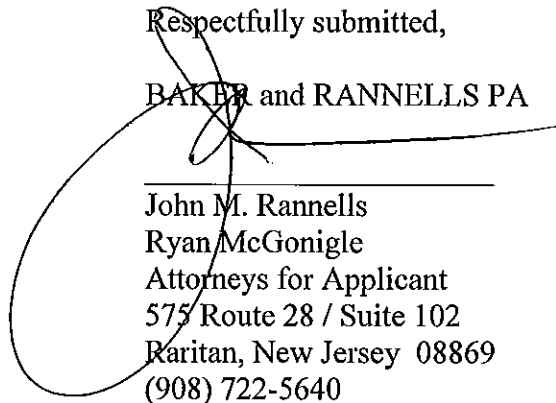
opinion on an ultimate issue of law.” See *Nationwide Transp. Fin. v. Cass Info. Sys. Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008)(quotation omitted). This did not stop Mr. Reidl from repeatedly proffering his conclusions as to the ultimate issues.

Although some of Mr. Reidl’s statements seem to be couched as the expert’s *opinion*, “‘opinion testimony that states a legal standard or draws a legal conclusion by applying law to facts is generally inadmissible.’” *Jackson v. United States*, 638 F.Supp.2d 514, 527 (W.D.N.C. 2009)(quoting *United States v. McIver*, 470 F.3d 550, 562 (4th Cir. 2006)).

In sum, Mr. Reidl is a lawyer and his so-called “expert opinion” reads as if it were an amicus brief to the Board. He appears much more the advocate than the expert. As such, and for all the aforesaid reasons, the Board should not give Mr. Reidl’s testimony any consideration and should grant Applicant’s Motion to Strike and/or Exclude it in its entirety.

Respectfully submitted,

BAKER and RANNELLS PA

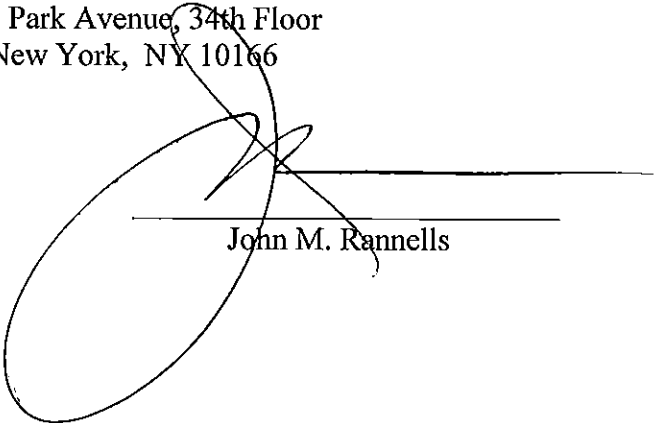


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing APPLICANT'S MOTION TO STRIKE AND/OR EXCLUDE in re: *White Rock Distilleries, Inc. v. Franciscan Vineyards, Inc.* Opposition No. 91191056 was served on counsel for Applicant, this 18th day of July, 2011 by sending same via First Class Mail, postage prepaid, to:

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